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August 23, 2002

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AUG 23 2002

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

VIA E-MAIL

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W.
Room
Washington, D.C. 20554

Re: Verizon Telephone Companies Petition for Emergency Declaratory and Other Relief, WC Docket No. 02-202; BellSouth Telecommunication, Inc., Tariff F.C.C. No. 1, Transmittal Nos. 657 and 635; Verizon Telephone Companies, Tariff F.C.C. Nos. 1, 11, 14 and 16, Transmittal No. 226; Southwestern Bell Telephone Company to Tariff F.C.C. No. 73, Transmittal No. 2906; Ameritech Operating Companies to Tariff F.C.C. No. 2, Transmittal No. 1312; Nevada Bell Telephone Company to Tariff F.C.C. No. 1, Transmittal No. 20; Pacific Bell Telephone Company to Tariff F.C.C. No. 1, Transmittal No. 77; Southern New England Telephone Companies to Tariff F.C.C. No. 39, Transmittal No. 77

Ex Parte

Dear Ms. Dortch:

The attached written *ex parte* was submitted today, August 23, 2002, via electronic mail, to William Maher, Bureau Chief, Wireline Competition Bureau, and Tamara L. Preiss, Division Chief, Pricing Policy Division, Wireline Competition Bureau, with copies sent electronically to Scott Bergmann, Vienna Jordan, Judith Nitsche and Julie Saulnier.

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In accordance with Section 1.1206 of the Commission's rules, an original and one copy of this letter is being filed with your office. If you have any questions concerning this filing, please do not hesitate to contact me.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "John J. Heitmann". The signature is fluid and cursive, with the first name "John" and last name "Heitmann" clearly distinguishable.

John J. Heitmann

JJH/cpa

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August 23, 2002

VIA E-MAIL

Mr. William Maher
Bureau Chief, Wireline Competition Bureau
Federal Communications Commission
445 12th St., SW
Washington, DC 20554

Ms. Tamara L. Preiss
Division Chief, Pricing Policy Division, Wireline Competition Bureau
Federal Communications Commission
445 12th St., SW
Washington, DC 20554

Re: Verizon Telephone Companies Petition for Emergency Declaratory and Other Relief, WC Docket No. 02-202; BellSouth Telecommunication, Inc., Tariff F.C.C. No. 1, Transmittal Nos. 657 and 635; Verizon Telephone Companies, Tariff F.C.C. Nos. 1, 11, 14, and 16, Transmittal No. 226; Southwestern Bell Telephone Company to Tariff F.C.C. No. 73, Transmittal No. 2906; Ameritech Operating Companies to Tariff F.C.C. No. 2, Transmittal No. 1312; Nevada Bell Telephone Company to Tariff F.C.C. No. 1, Transmittal No. 20; Pacific Bell Telephone Company to Tariff F.C.C. No. 1, Transmittal No. 77; Southern New England Telephone Companies to Tariff F.C.C. No. 39, Transmittal No. 77

Ex Parte

Dear Mr. Maher and Ms. Preiss :

Broadview Networks, Inc., Grande Communications Networks, Inc., Ionex Telecommunications, Inc., ITC^DeltaCom Communications, Inc., KMC Telecom Holdings, Inc., NewSouth Communications Corp., NuVox, Inc., NuVox Communications, Inc., Sage Telecom,

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Inc., Talk America, Inc., and XO Communications, Inc., (collectively, "CLEC Coalition"), by their undersigned counsel, respectfully submit this written *ex parte* in WC Docket No. 02-202, which was opened to address Verizon's "Petition for Emergency Declaratory and Other Relief".¹

In its self-styled Emergency Petition, Verizon urges the Commission to (1) expeditiously approve tariff revisions it had not yet filed, (2) "unequivocally support" positions taken by Verizon in various bankruptcy proceedings, and (3) assist Verizon in upending bankruptcy law by using the threat of end user service disruption to force cures where no legal obligation to cure exists. To fill out the picture, there also is the recent decision from the court in the WorldCom bankruptcy proceeding which denied Verizon's requests for prepayments and deposits and Verizon's own subsequent public admission that the "adequate assurance" provided by the court was indeed likely to be sufficient. If ever there was a case of "the boy who cried wolf", this is it. Verizon, BellSouth and SBC face no emergency. Rather, what they face is an opportunity to create more financial turmoil and end user service disruption by stripping their remaining competitors of working capital and raising their costs. This Commission should neither serve as nor provide the tool that enables the Bells to do this.

The purpose of this *ex parte* predominantly is to ensure that four Petitions to Suspend, or in the Alternative, Reject tariff revisions regarding security deposits, advanced payments and notice prior to disconnect or refusal to serve are incorporated into the record of WC Docket No. 02-202. It is our understanding that, although the issues raised by Verizon in its Emergency Petition previously had been raised elsewhere, the Commission may make policy decisions which affect other dockets and the suspended tariff revisions, in particular, in the context of the Verizon Emergency proceeding.² Accordingly, we respectfully request that the following petitions ("Petitions") be incorporated by reference into this docket: (1) Petition to Reject or Alternatively, Suspend and Investigate, In the Matter of Revisions by BellSouth Telecommunication, Inc., to Tariff F.C.C. No. 1, Transmittal No. 657, filed on July 26, 2002, (2) Petition to Reject or Alternatively, Suspend and Investigate, In the Matter of Revisions by BellSouth Telecommunication, Inc., to Tariff F.C.C. No. 1, Transmittal No. 635, filed on May 20, 2002; (3) Petition to Reject or Alternatively, Suspend and Investigate, In the Matter of Revisions by Verizon Telephone Companies, to Tariff F.C.C. Nos. 1, 11, 14, and 16, Transmittal No. 226 filed on August 2, 2002; and (4) Petition to Reject or Alternatively, Suspend and Investigate, In the Matter of Revisions by Southwestern Bell Telephone Company to Tariff F.C.C. No. 73, Transmittal No. 2906; Revisions by Ameritech Operating Companies to Tariff F.C.C. No. 2, Transmittal No. 1312; Revisions by Nevada Bell Telephone Company to Tariff

¹ Public Notice, DA 02-1859, WC Docket No. 02-202 (July 31, 2002).

² The CLEC Coalition recognizes the utility of addressing common issues in a single docket, but respectfully submits that inadequate notice has been given to make WC Docket No. 02-202 that docket. To protect itself from future litigation and avoid regulatory uncertainty, the Commission should seriously consider whether the vehicle selected (ironically, created by the company most likely to challenge it) is appropriate.

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F.C.C. No. 1, Transmittal No. 20; Revisions by Pacific Bell Telephone Company to Tariff F.C.C. No. 1, Transmittal No. 77; Revisions by Southern New England Telephone Companies to Tariff F.C.C. No. 39, Transmittal No. 77 filed on August 9, 2002, be incorporated into the record for WC Docket No. 02-202.

In these Petitions, CLEC Coalition members argued that the proposed tariff revisions were anticompetitive and would create additional financial instability in the industry by shifting massive amounts of capital (unbudgeted and often not available) from competitors to incumbents. Shortened notice provisions proposed by Verizon and SBC also could create end user service disruptions and force competitors into violations of Commission and state disconnect rules – all of this with the ILEC being the sole arbiter of what is due and what must be cured. None of these proposals, however, have been justified in terms of the need for them or the costs that would be imposed by them on competitors, competition, and end users. These ILECs continue to enjoy stunning success in avoiding bad debt (although apparently less stunning than a year or two ago) for the highly profitable services sold under the tariffs at issue. When bad debt goes from less than one percent to greater than one percent on billions of dollars of revenue, what we have is not an emergency but rather a slightly less spectacular collection rate. Moreover, the ILECs have provided no evidence that they have used the tools already available to them to stem this recent erosion. Indeed, the record suggests that their billing systems and processes are so inadequate that they are certainly a key contributor to the ILECs' alleged problems.

Mirroring the absence of proof that existing tools have not provided the Bells with sufficient protection in pre-petition bankruptcy situations, is an absence of proof that the Bells have not managed to get adequate assurance once a carrier customer has filed for bankruptcy. For example, the United States Bankruptcy Court for the Southern District of New York in the WorldCom Chapter 11 bankruptcy proceeding, in an August 14, 2002 order,³ determined that services provided by Utility Companies would be treated as "actual and necessary expenses" and granted Utility Companies an administrative expense priority claim, which constitutes a junior superpriority administrative claim, for "any and all unpaid charges for postpetition services provided by Utility Companies" to WorldCom. The bankruptcy court ordered that these claims are "pari passu" or equal among Utility Companies, junior only to two classes of creditors, DIP Lenders and intercompany junior liens and claims.⁴ The court further found that payments on the post-petition utility services rendered are to be made on "a timely basis, in accordance with applicable contracts and tariffs."⁵ In addition to granting Utility Companies special status for

³ *In re WorldCom, Inc., et al*, Order Pursuant to Sections 105(a) and 366(b) of the Bankruptcy Code Authorizing WorldCom to Provide Adequate Assurance to Utility Companies, Case No. 02-13533 (AJG) (rel. Aug. 14, 2002) ("Order").

⁴ *Id.*, at 2.

⁵ *Id.*, at 3.

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post-petition utility services rendered, the bankruptcy court further provided Utility Companies with the ability, in cases of payment default, to seek an order requiring immediate payment, or other appropriate relief or action available under any applicable tariff or regulation. For disputed amounts, the bankruptcy court required the establishment of expedited dispute resolution procedures for handling those amounts in post-petition invoices.⁶ Finally, in addition to these safeguards, the bankruptcy court ordered WorldCom to provide weekly financial reports to Utility Companies.⁷

Notably, the bankruptcy court did not find that prepayments and deposits were necessary to provide "adequate assurance" for payment of amounts owed for services rendered. In a statement released after the issuance of the Order, Verizon publicly acknowledged that "[i]t is likely that the protections instituted by the court will be sufficient to protect Verizon's interests as long as WorldCom's financial position does not materially worsen."⁸ If Verizon can tell the world that it does not need prepayments and deposits in this context, it certainly does not need new and additional means of imposing such requirements on its competitors in others. Accordingly, the Commission should reject the ILECs' tariff revisions regarding deposits, advanced payments and shortened notice intervals.

The Commission must also reject requests by Verizon and other ILECs to have the Commission aid and abet their efforts to use bankruptcy as a means of extorting payments by threatening end user disconnects, regaining lost customers, and stranding assets that have been and could continue to be used by facilities-based competitors.⁹ As providers of services for which there are no alternatives, ILECs retain substantial leverage over carriers in the bankruptcy process, as well as those who seek to bring carriers or their assets out of bankruptcy. It is neither appropriate nor necessary for the Commission to "unequivocally support" Verizon's and other ILECs' efforts to secure deposits and prepayments in bankruptcy court proceedings, as Verizon requests. The issues of payment to creditors on pre-petition debt and of "adequate assurance" on post-petition debt are governed by the bankruptcy code and are best left to the bankruptcy courts which obviously have expertise in these matters. To the extent the Commission determines that it is in the public interest to weigh-in on such matters in various bankruptcy proceedings, it must consider the totality of the circumstances, as well as the potential short-term and long-term

⁶ *Id.*, at 3.

⁷ The Order further required WorldCom to "comply with all applicable regulatory requirements, including but not limited to, timely service of notices to customers consistent with 47 U.S.C. § 214" to the extent termination of service becomes necessary. *Id.*, at 5.

⁸ See "Judge Compromises on LEC's Request for Tougher WorldCom Payment Plan," *TR Daily*, August 15, 2002.

⁹ In this regard, the Comments of the Mid-Size Carrier Group are most egregious. The Commission should flatly reject that group's proposals to ensure the "seamless transition" of wayward customers back to their monopoly providers.

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impacts of the positions it advocates – it simply cannot commit to support Verizon and other ILECs blindly based on the false notion that healthy monopolies are good for the economy in general and end users in particular.

Finally, the Commission also must reject the efforts of Verizon and other ILECs to use the threat of end user disconnects as a means of extorting “cures” where the bankruptcy code creates no such obligation. Indeed, the Commission should affirmatively reject the “assume the agreement and all debts or face end user service disruption” ultimatums issued by Verizon and other ILECs. Such ultimatums cannot be squared with either the bankruptcy code or the Communications Act, as they effectively foreclose any ability to reject contracts (a carrier rejecting contracts would face service disruptions on day one, as well as disconnect and reconnect fees, and unknown liabilities with respect to any end user service outage that occurs) and make it more costly for assets to be purchased from a bankrupt estate and more likely that those assets will be wasted and that customers simply will be forced to return to their former monopoly provider.

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For all of the foregoing reasons, and those set forth in the Petitions, the Commission should (1) reject the ILECs' tariff revisions incorporating additional means to impose deposit and prepayment requirements, and shortening refusal of service/disconnect notice intervals, and (2) deny all other relief sought by Verizon in its Emergency Petition.

Respectfully submitted,



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cc: Scott Bergmann
Vienna Jordan
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